Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Docket No. 78-240

LOIS PALMER,

Petitioner,

—against—

FRANK TICCIONE, EDWARD HAYES, BENJAMIN GIAMBALVO, WILLIAM O'CONNELL, WILLIAM GARGIULO, ROBERT JACOB AND N. PAUL BUSCEMI, and THE SCHOOL BOARD OF THE COPIAGUE UNION FREE SCHOOL DISTRICT #5,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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IN THE

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LOIS PALMER,

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—against—

FRANK TICCIONE, EDWARD HAYES, BENJAMIN GIAMBALVO, WILLIAM O'CONNELL, WILLIAM GARGIULO, ROBERT JACOB AND N. PAUL BUSCEMI, and THE SCHOOL BOARD OF THE COPIAGUE UNION FREE SCHOOL DISTRICT #5,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Introduction

This brief is submitted in opposition to the petition for certiorari and, for the reasons set forth herein, it is urged that the Court decline to review the decision of the Court of Appeals for the Second Circuit.

Preliminary Statement

This action is brought by a teacher in the Copiague Union Free School District, Suffolk County, New York, who was retired shortly after the completion of the 1974-

75 school year, the year in which she attained the age of seventy years. The retirement was directed by Section 510(1)(b) of the New York State Education Law. Petitioner claims that her involuntary retirement, based solely on age, is in violation of her rights to equal protection and due process under the Fourteenth Amendment.

There is no dispute as to the facts in this case. Prior to her retirement, petitioner served the school district as a tenured teacher, assigned to teach kindergarten. Her supervisors deemed her service to be satisfactory. There is no factual issue as to petitioner's ability to do the job at the time of her retirement.

Opinions Below

Honorable Edward R. Neaher, Judge of the United States District Court for the Eastern District of New York, dismissed the complaint for want of a substantial federal question. (433 F. Supp. 653) In arriving at this conclusion the Court discussed the leading cases on involuntary or mandatory retirement, including the numerous instances where the Supreme Court dismissed appeals for want of a substantial federal question. Judge Neaher then cited the decision of the Court of Appeals for the Second Circuit in *Rubino* v. *Ghezzi,* 512 F2d 431, which rejected as insubstantial the claim that mandatory retirement at age seventy violates the Due Process and Equal Protection Clauses. (433 F. Supp. at 654)

Judge Neaher went on to dispose of the remaining contentions raised by the petitioner, including the claimed distinction between mandatory and discretionary retirement statutes. As to the latter the Court relied on the holding of the Supreme Court of the State of New York, Appellate Division, Second Department, in *Harren* v. *Middle Island Central School District No. 12,* 49 AD2d 879, 373 NYS2d 20, which specifically rejected the purported distinction raised by petitioner between mandatory and discretionary retirement.

The Court of Appeals for the Second Circuit, in an opinion by Hays, C.J., affirmed the dismissal of the complaint. In so doing, that Court relied on a number of decisions dealing with compulsory retirement for employees involved primarily with mental skills. In all of those cases the respective courts rejected the equal protection and due process challenges raised by petitioner. Included in the discussion was the Second Circuit's most recent decision in *Johnson* v. *Lefkowitz,* 566 F2d 866 (2d Cir., 1977). Judge Hays went on to discuss *Gault* v. *Garrison,* 569 F2d 993 (7th Cir., 1977), the only exception to this uniform line of decisions and a case which involved mandatory retirement of a teacher at age 65.

The rationale in *Gault* was both distinguished and rejected by the Second Circuit. Rejection was premised on prior decisions which had sustained compulsory retirement statutes in like and similar situations and on the too narrow conception by the *Gault* court of the possible rational bases for a compulsory retirement statute. In *Gault* the Seventh Circuit, relying on *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, assumed in using the rational basis test that the strongest justification for a retirement law for teachers is to remove those who are unfit. Thus, it ordered an evidentiary hearing to determine the teacher's fitness to teach; such fitness to be determined in the context of teaching ability rather than physical ability. The Second Circuit properly recognized that teaching ability is not the only criterion to be considered in applying the rational basis test. Indeed, Judge Hays articulated several other possible criteria such as providing employ-

ment opportunities for young teachers who will bring fresh ideas and new techniques to the classrooms or to open up more places for minorities.

The factual distinction between the two cases recognized by the Second Circuit involved the age at which retirement became mandatory. In *Gault* the teacher was retired at age 65, as opposed to 70 years in the instant action.

Finally, the Court denied pendent jurisdiction over the State claims raised by petitioner, relegating her to the State courts for their consideration.

Pertinent Statute

As here pertinent, Section 510 of the Education Law reads as follows:

> §510(1)(b). "Any member who has attained age seventy may be retired at his own request or at the request of his employer if he or his employer files with the retirement board a statement duly attested setting forth at what time subsequent to the execution and filing thereof retirement is desired, and if throughout the year immediately preceding the filing of such statement he shall have been in service as a teacher in this state. The retirement board shall retire said member as of the date so specified or as of such other time within thirty days thereafter as the retirement board may find advisable."

POINT I

Petitioner's retirement pursuant to the provisions of the Education Law of the State of New York, §510 (1)(b), was not in violation of her constitutional rights.

The validity of involuntary retirement of public employees, with but one exception, has been uniformly upheld in both state and federal forums. That exception, *Gault* v. *Garrison,* 569 F2d 993, is discussed in Point II of this brief.

The New York State Courts have had the opportunity to pass on the validity of §510(1)(b) of the Education Law, as well as §70(c) of the New York State Retirement and Social Security Law; and in both instances have upheld the right of the governmental agency to require an employee to retire at age seventy. *Harren* v. *Middle Island Central School District*, n.o.r., Sup. Ct., Suf. Co. (Tasker, J., Sept. 1974); aff'd 49 AD2d 879, 373 NYS2d 20; *Nurenberg* v. *Ward*, 84 Misc2d 80, 375 NYS2d 785, reversed 51 AD2d 1022, 381 NYS2d 412.

The *Harren* case offers the same fact pattern as the case at bar; a teacher who was retired at age seventy pursuant to §510(1)(b) of the Education Law. Special Term dismissed the petition in the Article 78 proceeding.* In so doing, that Court rejected most, if not all, of the contentions raised in this action. As here pertinent, the Court stated:

> "Petitioner's contentions are without substance. The cited sections of the tenure acts, §§3012, 3020 and

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* A copy of the Special Term opinion is attached as Appendix "A".

3020a deal with removal or dismissal of a tenured or non-tenured teacher. They have no application to termination of service by compulsory retirement on account of age. (*Humbeutel* v. *City of New York*, 125 N.Y.S.2d 198, aff'd 283 App. Div. 1011, aff'd 308 N.Y. 904; *People* v. *Scannel*, 53 App. Div. 161, aff'd 164 N.Y. 572; *Geary* v. *Phillips*, 53 Misc.2d 337; cf. *Pettit* v. *McCabe*, 60 Misc.2d 127) * * *

"Petitioners contentions under the cited federal act are likewise without substance. 29 USCA §630 limits the application of the [Federal Age Discrimination in Employment Act] to persons between 40 and 65 years of age. Obviously, the statute has no application to the 70 year old petitioner.

"Petitioner's vague contention of violation of her Fourteenth Amendment rights (and presumably those secured under N.Y. State Constitution 1 §11), is not supported by any specific allegations, other than the contention that the retirement of petitioner because of her age is discriminatory. It is, however well settled that differentiation based on age is permissible if it is based on some rational foundation and does not result in invidious discrimination between classes of persons (*Marino* v. *Town of Ramapo*, 68 Misc.2d 44 at page 61-62 and cases cited therein). The Legislature has prescribed as an occupational qualification, (see: *McIlvane* v. *Pennsylvania State Police*, 296 Atl.2d 630 aff'd 309 Atl.2d 801, App. Dism. 94 S.Ct. (1583), that persons in the employ of the State or its municipalities, with some exceptions, shall retire at age 70 (Retirement and Social Security Law §70 subd. b; see also Constitution Article 6, §25 and Judiciary Law §23; compare 5 U.S.C.A. §8335 with respect to federal employees). *The distinction between*

the cited statutes and Education Law §510 subd. 1b, is the substantially greater degree of discretion vested in employers (Education Law §501 subd. 3) of public school teachers as compared to other municipal employers, the State or the Federal government. Petitioner has not cited, nor has the Court been able to locate, any authority which would render the legislative policy unconstitutional based on the aforesaid distinctions. * * * (Emphasis supplied)

The Appellate Division of the Supreme Court of New York State affirmed the dismissal of the teacher's petition in the following brief memorandum:

"On the record in this appeal, there is no evidence of constitutional discrimination. A mandatory retirement policy at age 70 is not unconstitutional under present standards, and this record does not reveal anything other than a statutorily authorized mandatory retirement policy." *Harren* v. *Middle Island Central School No. 12*, 49 AD2d 879, 373 NYS2d 20 (2nd Dept., 1975).

Nurenberg v. *Ward, supra,* involved a challenge to the mandatory retirement provisions of §70(c) of the Retirement and Social Security Law. Here too the petitioner, a licensed psychiatrist, was retired at age 70. In upholding the statutory right to mandate the petitioner's retirement, the Court stated (51 AD2d at 1023):

"There being a valid State objective in maintaining the quality of performance of State employees, and there being a general relationship between advancing age and decreasing ability to respond to the demands of a job, it must be concluded that the challenged classification of persons who have attained the age of 70

years does not violate the equal protection guarantee (cf. *Murgia* v. *Massachusetts Board of Retirement*, 376 F.Supp. 753, 386 F.Supp. 179, affd. 421 U.S. 972, 95 S.Ct. 1972, 44 L.Ed.2d 464) Nor do we find that there has been an interference with liberty and property of such a nature as would cause us to invoke the requirements of procedural due process (see *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 270, 33 L.Ed.2d 548). * * *"

See also *Johnson* v. *Lefkowitz*, 566 F2d 866; *Weiss* v. *Walsh*, 324 F. Supp. 75, aff'd 461 F2d 846, cert. den. 409 U.S. 1129, reh. den. 410 U.S. 970; *Rubino* v. *Ghezzi*, 512 F2d 431, cert. den. 423 U.S. 891; *Cannon* v. *Guste*, —— F.Supp. —— (E.D.La., 1975), aff'd 423 U.S. 898).

Most pertinent to the issues raised by petitioner and in response thereto is the rationale of Judge Kaufman in *Johnson, supra:*

"At the heart of Johnson's complaint in his claim that §70 violates the equal protection clause and creates an impermissible, irrebuttable presumption. Yet, these very contentions have been rejected in a variety of contexts by virtually every court considering them, including the Supreme Court and this court. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (mandatory retirement of state police officers at age fifty); *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974) (mandatory retirement of state police officers at age sixty); *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir.), cert. denied, 423 U.S. 891 (1975) (mandatory retirement of state court judges at age 70); *Weissbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), aff'd 420 U.S. 940 (1975) (mandatory retirement of federal civil service employees at age seventy).

"These cases uniformly instruct that age is not a suspect classification requiring strict scrutiny of the state's scheme of age restrictions. See also *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd, 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973). And, in addition, they clearly establish that the Constitution does not afford any individual a protected right to public employment. See also *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Accordingly, the state need not articulate a rational basis for its statutory scheme. It would appear without question that §70 is reasonably related to legitimate state interests in efficiency and economy. A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks. And the statute before us, which permits some employees to continue in their jobs until the age of 78, serves these legitimate state purposes without needless prejudice to the greater number of qualified employees.

"Johnson's argument that §70 establishes an irrebuttable presumption is substantially the same as his equal protection claim. Moreover, it is now clear that the applicability of the so-called irrebuttable presumption doctrine is limited to those cases involving suspect classifications. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); Note, The *Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534 (1974)." (footnote omitted) (566 F2d at 868-69)

Challenges to mandatory retirement are neither novel nor new, especially with respect to teachers. For example, in 1938, the United States Supreme Court dismissed an appeal from the Supreme Court of Oregon, in a case in-

volving the right to retire a teacher upon reaching the age of 65 years. *Campbell* v. *Aldrich*, 79 P2d 257, 305 U.S. 559. In that case, the Oregon Supreme Court stated (79 P2d at 261):

> "Whether such legislation is wise is not for this court to determine. It is sufficient to say that we do not consider such compulsory retirement of teachers arbitrary or unreasonable * * * It is beside the question that the plaintiffs are efficient and well qualified to teach. Laws are not enacted to fit individuals."

We submit that in light of the foregoing cases which deal specifically with termination of service based on reaching the age of retirement, the cases cited by petitioner dealing with the rights of inividuals to teach under other circumstances are inapposite. The Courts, in dealing with mandatory or involuntary retirement laws, have recognized that they constitute an exception to the general rule concerning the property rights of teachers and that there exist overriding State and Federal policies which foster and, indeed, encourage the concept of mandatory retirement. (See *Johnson* v. *Lefkowitz, supra.*)

The foregoing clearly establishes that petitioner has not made out a cause for relief either under State or Federal Law. Neither her rights to equal protection of the laws nor due process were violated. The complaint was properly dismissed on the merits by both the District Court and the Court of Appeals. Accordingly, certiorari should be denied.

POINT II

Certiorari should not be granted based on the presumed conflict in holdings between the Second and Seventh Circuits in *Palmer* and *Gault* v. *Garrison*.

In Point II of petitioner's brief in support of her petition for certiorari she asserts that the application should be granted based on the so-called conflicting decisions of the Second and Seventh Circuits in *Palmer* and *Gault* v. *Garrison*, 569 F2d 993.

In the first instance, we disagree that a conflict exists. While it is true that the two cases are similar in many respects, there is one major difference. The retirement age in *Gault* is 65 years, as opposed to 70 in *Palmer*. This is significant when it is recognized that the national policy is toward extending the maximum age limit for mandatory retirement from 65 to 70. See *Gault* v. *Garrison*, 569 F2d at 999, dissenting opinion of Pell, C.J. See also the discussion by Judge Hays of the recent amendments to the Age Discrimination in Employment Act of 1967. (*Palmer* v. *Ticcione*, slip opinion, pp. 3068-70)

In any event, we submit that even if no distinction can be made between the two cases, a conflict of decisions between circuits is not a sufficient reason for granting certiorari where the issues posed for review are not significant. As we have shown in Point I, *supra*, the question of mandatory or involuntary retirement has been before the Supreme Court on numerous occasions and in each instance the retirement and the law upon which it was based were upheld. Most pertinent in this respect is the language of the Second Circuit in *Rubino* v. *Ghezzi*, 512 F2d at 433:

> "* * * We are of the opinion that the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the effort to clothe it in constitutional garb is frivolous. We therefore affirm the dismissal of the complaint."

We submit, therefore, that further consideration of this issue by the Supreme Court is not required.

CONCLUSION

There is no basis for certiorari and the Court should decline to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

HENRY A. WEINSTEIN
Attorney for Respondent

CHARLES D. MAURER
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Of Counsel

APPENDIX

Appendix "A"

(Opinion of Tasker, J. Dated September, 1974)

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

Index No. 12656/74

In the Matter of the Application of

ALICE HARREN,

Petitioner,

—against—

MIDDLE ISLAND CENTRAL SCHOOL DISTRICT No. 12,

Respondent.

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Petitioner, who attained age 70 on January 22, 1974, brings this proceeding pursuant to CPLR Article 78 to annul a determination of respondent retiring petitioner from service because of her attainment of age 70. Respondent, by notice dated July 23, 1974, pursuant to Educa-

tion Law §510, subd. 1b directed to the New York State Teachers Retirement Board and in accordance with a board policy adopted December 10, 1964 which mandates retirement at age 70, requested petitioner's retirement as of September 1, 1974.

Petitioner contends that compulsory retirement of a tenured teacher violates Education Law §§3012, 3020 and 3020a, as well as Article IX, §11 of the collective bargaining agreement between respondent and the Middle Island Teachers Association; and that respondent's request that petitioner be retired on account of age violates the Fourteenth Amendment of the United States Constitution and the Federal Age Discrimination in Employment Act (29 USCA §621 et seq.).

Respondent asserts its right to request petitioner's retirement under the cited section, and long established policy.

Petitioner's contentions are without substance. The cited sections of the tenure acts, §§3012, 3020 and 3020a deal with removal or dismissal of a tenured or non-tenured teacher. They have no application to termination of service by compulsory retirement on account of age. (*Humbeutel* v. *City of New York*, 125 N.Y.S. 2d 198 aff'd 283 App. Div. 1011 aff'd 308 N.Y. 904; *People* v. *Scannel*, 53 App. Div. 161, aff'd 164 N.Y. 572; *Geary* v. *Phillips*, 53 Misc. 2d 337; cf. *Pettit* v. *McCabe*, 60 Misc. 2d 127). Similarly, Article IX §11 of the collective bargaining agreement has no application. Petitioner has not been "disciplined, dismissed, reduced in rank or compensation, or deprived of any professional advantage that the without just cause". The Legislature has determined, as a matter of public policy, that respondent may request petitioner's retirement upon her attaining age 70 (Education Law §510 subd. 1b) compare

Retirement and Social Security Law §70 subd. b). Respondent's exercise of its statutory right in this respect does not fall within the foregoing language (cf. *Legislative Conference of City Univ. of N.Y.* v. *Board of Higher Education*, 38 App. Div. 2d 478 aff'd 31 N.Y.2d 926).

Petitioner's contentions under the cited federal act are likewise without substance. 29 USCA §630 limits the application of the act to persons between 40 and 65 years of age. Obviously, the statute has no application to the 70 year old petitioner.

Petitioner's vague contention of violation of her Fourteenth Amendment rights (and presumably those secured under N.Y. State Constitution 1 §11), is not supported by any specific allegations, other than the contention that the retirement of petitioner because of her age is discriminatory. It is, however, well settled that differentiation based on age is permissible if it is based on some rational foundation and does not result in invidious discrimination between classes of persons (*Marino* v. *Town of Ramapo*, 68 Misc. 2d 44 at pages 61-62 and cases cited therein). The Legislature has prescribed, as an occupational qualification (see: *McIlvane* v. *Pennsylvania State Police*, 296 Atl 2d 630 aff'd 309 Atl 2d 801, App. Dism. 94 S.C.T. 1583), that persons in the employ of the State or its municipalities, with some exceptions, shall retire at age 70 (Retirement and Social Security Law §70 subd. b.; see also: Constitution Article 6, §25 and Judiciary Law §23; compare: 5 U.S.C.A. §8335 with respect to federal employees). The distinction between the cited statutes and Education Law §510 subd. 1b, is the substantially greater degree of discretion vested in employers (Education Law §501 subd. 3) of public school teachers as compared to other municipal employers, the State or the Federal government. Peti-

tioner has not cited, nor has the Court been able to locate, any authority which would render the legislative policy unconstitutional based on the aforesaid distinctions. (See contra: *McIlvane* v. *Penn. State Police, supra.*) In view of the Court's finding with respect to the exercise of discretion vested in respondent, questions as to the validity of the respondent's policy adopted in December of 1964 need not be passed upon.

Respondent may have judgment dismissing the petition. The stay of arbitration sought by the answer is denied without prejudice, since the party seeking arbitration, Middle Island Teachers' Association is not a party to this proceeding.

Settle judgment.

J.S.C.

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